No. 80-907

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM JENSEN, EDWIN KREMER, JOHN GARDELLA, WILLIAM KUYL, DOMINICK BISBANO, LINDSAY HOYT, FRANCIS S. HAGGERTY, RICHARD TRIPPE, ANTHONY LORE and GARY D. LUECK,

Petitioners,

—v.—

FARRELL LINES, INC., and
INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT FARRELL LINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a private maritime shipping company, which receives subsidies from the United States government and is subject to government regulation, engage in "state action" when, in accordance with an AFL-CIO arbitration award, it recognizes one union as the exclusive bargaining agent for its supervisory deck officers and the United States government was not involved in any way in the company's decision to recognize that union?

2. Does a maritime shipping company that requires its supervisory deck officers to maintain membership in the union recognized as exclusive bargaining agent, in compliance with the union shop provision in the company's contract with the union, infringe the First Amendment right of association of those officers who do not wish to join that union, even though requiring membership is in accordance with an AFL-CIO arbitration award and national labor policy?

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Respondent Farrell Lines, Inc. opposes the petition for a writ of certiorari. The decision of the Second Circuit Court of Appeals does not conflict with the decision of any other Circuit Court of Appeals and is correct under the holdings of this Court. It presents no issue of law that requires review.

STATEMENT OF THE CASE

The Union Jurisdictional Dispute

This case involves conflicting union representation claims that arose from respondent Farrell Line's acquisition in March, 1978, of American Export Lines, Inc. ("AEL"), a company then in Chapter XI reorganization. Farrell is a private United States flag shipping company. It has had a long-standing collective bargaining relationship covering deck officers with respondent International Organization of Masters, Mates and Pilots ("MMP") and their agreement provides that it shall apply to any ships acquired by Farrell during its term (J.A. 725; J.A. 855).[1]

Plaintiffs are members of defendant Brotherhood of Marine Officers ("BMO"), an affiliate of the Marine Engineers Beneficial Association ("MEBA"). BMO represented the deck officers—including petitioners—on the AEL ships. BMO insisted that it had the right to continue to represent those officers after Farrell acquired AEL, notwithstanding the Farrell-MMP contract. Except for three ships operated by another company, AEL was the only employer with whom BMO had an agreement covering deck officers (J.A. 241-42).[2]

Deck officers are "supervisors" as defined by the National Labor Relations Act. 29 U.S.C. § 152(11). The Act excludes "supervisors" from its protections. 29 U.S.C. § 164(a). Consequently, the National Labor Relations Board did not have jurisdiction to decide the dispute between MMP and BMO.

Farrell attempted to resolve the conflict so that it could purchase AEL. BMO would not accept an orderly solution and

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1 We adopt the abbreviations "J.A." and "App." used by petitioners to refer, respectively, to the Joint Appendix in the Court of Appeals and the Appendices to their Petition.

2 The rivalry between MMP and MEBA, BMO's parent, is a "prolonged struggle" of "intense competition." *International Organization of Masters, Mates & Pilots v. N.L.R.B.*, 575 F.2d 896, 899 (D.C. Cir. 1978).

it threatened to strike unless Farrell assumed the AEL-BMO collective bargaining agreement (J.A. 400-02; J.A. 649-51). However, MMP did agree that Farrell could deal with BMO until there had been a resolution of the conflicting jurisdictional claims under Article XX of the AFL-CIO constitution (J.A. 402; J.A. 698). Article XX is the jurisdictional dispute arbitration procedure binding on both unions by virtue of their AFL-CIO affiliations (J.A. 833-38).

The AEL Acquisition

Farrell initially conditioned its bid for AEL on making satisfactory arrangements with the AEL and Farrell unions "concerning [each] such union's jurisdiction with respect to the manning of the vessels of [Farrell] and Export Lines subsequent to the Final Closing" (J.A. 669). As a consequence of, among other things, MMP's agreement to seek peaceful resolution of the dispute before the AFL-CIO, Farrell deleted that condition from its bid (J.A. 673).

Petitioners selectively quote the transcript of the Bankruptcy Court hearing to try to create the impression that Farrell agreed to accept the BMO contract (Pet., p. 6). Farrell agreed only to accept resolution of the labor dispute in another forum—the AFL-CIO—instead of in the Chapter XI proceedings. Counsel for AEL thus reported (J.A. 672) to the Bankruptcy Court:

> [W]e have discussed the labor problems and we have come to the conclusion that this is not the proper forum to resolve those problems. Whatever contractual arrangements are present with respect to the labor unions will continue along in the merged company and Farrell Lines has agreed to delete their condition.

Farrell was the sole bidder for AEL and on January 11, 1978, the Bankruptcy Court accepted its bid (J.A. 678-79). AEL's Chapter XI plan of arrangement required Farrell to complete the acquisition by the end of March, 1978. On several occasions between January and March, Farrell communicated to BMO that MMP intended to take their dispute to Article

XX arbitration under the auspices of the AFL-CIO (J.A. 391-92; J.A. 402-04). BMO responded that it would take "drastic measures" against Farrell unless Farrell accepted the BMO collective bargaining contract (J.A. 681).

Relying on MMP's agreement to seek a peaceful resolution of the dispute, Farrell acknowledged the BMO contract on March 28, 1978, when it consummated the acquisition of AEL (J.A. 815). A few days before, however, Farrell had reiterated to both unions that it was entering into the agreement with BMO to avoid a strike and that it would be bound by any Article XX determination of the dispute (J.A. 396-98; J.A. 698). Shortly after Farrell completed the acquisition MMP initiated an Article XX proceeding against BMO (J.A. 682-84). BMO counterclaimed against MMP and through its parent union, MEBA, actively participated in the Article XX arbitration (J.A. 103-05; J.A. 686; J.A. 1459-1504; J.A. 1549-50).

The Article XX Arbitration

The Article XX arbitrator issued a decision on July 31, 1978, upholding MMP's claim to be the exclusive representative for all deck officers employed by Farrell (J.A. 850-55). The arbitrator found that "BMO refused to respect the MM&P agreement" and that "in order to avoid a confrontation, Farrell signed a short agreement with BMO continuing the terms" of the AEL-BMO contract (J.A. 853). The arbitrator ruled that "the former [American] Export vessels must be treated as an [accretion] . . . to the Farrell-MM&P bargaining unit, for which MM&P has an established collective bargaining relationship" (J.A. 855). BMO appealed to the AFL-CIO Executive Council, which affirmed the arbitrator's decision on February 28, 1979 (J.A. 856).

Farrell's Recognition of MMP as the Exclusive Bargaining Representative

After the affirmance of the Article XX decision, BMO withdrew its claim to represent the deck officers (J.A. 707-09; J.A. 1552-57). Farrell notified the officers on the former AEL

ships—including petitioners—that thereafter they would have to satisfy MMP membership requirements as a condition of employment (J.A. 692-93). MMP advised the BMO officers that they could retain their positions on Farrell's ships if they joined MMP and paid dues (J.A. 876-80). MMP waived its initiation fee for each BMO officer accepting the offer (*id.*) and permitted the officer to maintain his BMO membership (*id.*). Many BMO officers accepted and they have continued to work for Farrell under the MMP contract (J.A. 474; App. 97a).[3]

This Petition

Petitioners are BMO officers who rejected MMP's offer and refused to accept the AFL-CIO decision. On March 15, 1979, several of them refused peacefully to leave the Staghound, the first Farrell ship to reach port after announcement of the final Article XX decision (J.A. 289-90; J.A. 314-17; App. 98a). The next day they commenced this lawsuit. The District Court consolidated their preliminary injunction motion with the trial on the merits under Rule 65(a)(2), F.R.Civ.P., and held hearings between March 30 and May 7, 1979.

Among the arguments made by petitoners below was that because of federal subsidization and regulation of the maritime industry, Farrell's decision to recognize MMP as exclusive bargaining agent was "state action" that violated their First Amendment right of association. According to petitioners, Farrell could not require membership in MMP as a condition of employment without a prior determination that it was the majority union. The District Court accepted this argument.

Because deck officers are "supervisors" excluded from the operation of the National Labor Relations Act, that statute did

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3 Petitioners contend that Farrell deprived BMO officers of health, vacation and pension benefits under the BMO contract after it recognized MMP as the exclusive bargaining representative (Pet., p. 8 n.7). Farrell and BMO adjusted these matters in another arbitration (J.A. 1552-57) and Farrell long ago paid petitioners in compliance with the arbitration award.

not provide a procedure for determining whether MMP was the majority union. The District Court ordered an election among the deck officers under the supervision of a special master (App. 85a-91a). On appeal by Farrell and MMP, the Second Circuit Court of Appeals reversed that judgment, finding neither "state action" nor, even if there had been "state action," an infringement of petitioners' right of association (App. 92a-141a).

Farrell's Operations Under the Merchant Marine Act

Under the Merchant Marine Act, 46 U.S.C. § 1101 *et seq.*, Farrell receives from the Department of Commerce operating-differential subsidies as reimbursement for the difference between crew wages on its ships and on those of foreign competitors (J.A. 455; 46 U.S.C. § 1173). These subsidies account for only about 12% of all operating expenses (J.A. 470). Farrell does not receive subsidies for such major items as fuel, maintenance and repair, stores and equipment, insurance, canal tolls, cargo handling costs and port and terminal expenses (J.A. 456-59).

No government official participates in the conduct of Farrell's collective bargaining relations (J.A. 459-60). Neither the Commerce Department nor any federal official had a role in Farrell's decision to abide by the Article XX ruling and recognize MMP as the exclusive bargaining agent.

Although petitioners, citing 46 U.S.C. § 1173(b), assert that "[t]he Secretary of Commerce must review Farrell's collective bargaining agreements . . . and determine that they are fair and reasonable and the product of *bona fide*, arm's length collective bargaining" (Pet., p. 14), the statute contains no such provision (J.A. 465-66). With regard to crew wages, 46 U.S.C. § 1173(b) provides only that "the amount of the operating-differential subsidy . . . shall equal the excess of the subsidizable wage costs of the United States officers and crews . . . over the estimated fair and reasonable cost of the same items of expense . . . if such vessel or vessels were operated

under the registry of a foreign country whose vessels are substantial competitors . . . ." The statute directs the Secretary of Commerce to determine "subsidizable wage costs" in accordance with an index prepared by the Bureau of Labor Statistics (J.A. 465-66; 46 U.S.C. §§ 1173(c)(1)(D), (c)(2) and (c)(3)). The Secretary does not review the reasonableness of Farrell's collective bargaining agreements in calculating its subsidy (J.A. 465-66).

The Commerce Department has established minimum manning and wage scales for vessels receiving an operating-differential subsidy. 46 U.S.C. § 1131(a); 46 C.F.R. § 262.11. These minimum scales do not restrict Farrell's power to pay higher wages. 46 C.F.R. § 262.2. As a practical matter, the government's minimum scales have no effect on a maritime employer's relations with the deck officer unions. The MMP and BMO contracts both provide wages far above the government's scales (*compare* 46 C.F.R. § 262.11 *with* J.A. 731-32; J.A. 790-92).

The Commerce Department no longer supervises the signing of ship's articles by crew members at the beginning of each voyage. Congress has eliminated the Office of the Shipping Commissioner, which had performed that function. *Department of Transportation and Related Agencies Appropriation Act, 1980*, PL 96-131, Title I, 93 Stat. 1023 (1979).

The Commerce Department partially subsidizes the construction of Farrell's ships to meet the lower cost of foreign shipbuilders (J.A. 463-64; 46 U.S.C. §§ 1151, 1152). The Department pays the subsidies to the United States shipbuilders, not to Farrell (J.A. 463; 46 U.S.C. §§ 1152, 1155). To purchase a ship Farrell must pay at least 25% cash and amortize the remainder over twenty-five years with interest at the prevailing market rate for United States obligations. 46 U.S.C. § 1152(c). Farrell owns the ships and their equipment (J.A. 459).

Congress has declared that a primary objective of the subsidy program is to maintain private ownership in the maritime industry, 46 U.S.C. § 1101(c), and that the success of the

program depends upon "substantial private capital investment . . . ." 1970 U.S. Code Cong. & Admin. News at 4196. The United States government can requisition Farrell's ships in time of national emergency, but in such case Farrell, like any private property owner, would be entitled to "just compensation for the property taken or for the use of such property . . . ." 46 U.S.C. § 1242(a).

The Secretary of Commerce may require at the government's expense design features in subsidized ships "suitable for economical and speedy conversion into a naval or military auxiliary, or otherwise suitable for the use of the United States Government in time of war or national emergency." 46 U.S.C. § 1151(b). These design features represent an insignificant element of the cost of construction. For example, in 1977, the last year for which statistics were available at the time of trial, they accounted for about one-tenth of one percent of the cost of five container ships then under construction for AEL and Farrell (J.A. 860-61).

The Commerce Department specifies minimum and maximum sailings permitted yearly on a subsidized route, but within those limits Farrell alone determines the number of annual trips (J.A. 460). The Department does not regulate Farrell's use of non-subsidized vessels on non-subsidized trade routes (J.A. 461). The United States government does not receive preferential treatment when shipping cargo on Farrell's ships (J.A. 461-62).

No government official participates in the operation of Farrell's fleet (J.A. 459-60). The Commerce Department does not maintain officials aboard Farrell's ships (J.A. 459).

REASONS FOR DENYING THE WRIT

The Second Circuit Court of Appeals decided that Farrell's recognition of MMP as exclusive bargaining agent was not "state action" and, even if there had been "state action," that Farrell did not infringe petitioners' right of association. Both bases for the Court's decision are consistent with the holdings of the other Circuit Courts of Appeals and correct under the decisions of this Court. Either is ground for denying the writ.

I.

THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS THAT THERE WAS NO STATE ACTION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT OF APPEALS AND IS CORRECT UNDER THE HOLDINGS OF THIS COURT. PETITIONERS' STATE ACTION CLAIM DOES NOT PRESENT AN ISSUE OF LAW THAT REQUIRES REVIEW.

The other courts that have considered the question have also held that the collective bargaining practices of maritime employers do not involve "state action." *Rodriguez v. Conagra, Inc.*, 527 F.2d 540 (1st Cir. 1976); *Burke v. Mathiasen's Tanker Industries, Inc.*, 393 F. Supp. 790 (E.D. Pa. 1975). There is no conflict between the Second Circuit and any other court.

Petitioners do not even claim a conflict. They assert only that the Second Circuit's holding is "contrary to" (Pet., p. 17) the factually different decisions of *McQueen v. Druker*, 438 F.2d 781 (1st Cir. 1971), *Braden v. University of Pittsburgh*, 552 F.2d 948 (3d Cir. 1977), *Wimbish v. Pinellas County, Florida*, 342 F.2d 804 (5th Cir. 1965), and *Hampton v. City of Jacksonville*, 304 F.2d 320 (5th Cir.), *cert. denied sub nom. Ghioto v. Hampton*, 371 U.S. 911 (1962).

McQueen, *Braden*, *Wimbish* and *Hampton* all involved claims of discrimination on property owned or controlled by a

governmental body. In *Braden*, additionally, government officials sat on the university's board of trustees and the State legislature had declared the university an instrumentality of the State. 552 F.2d at 964-65. These cases fall within the rule of *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726 (1961), that under certain circumstances the private use of public property or the holding out of the private entity as a public body is "state action." *See also Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 174-75 (1972).

There are no such indicia of government control in this case. Farrell owns its ships and their equipment. No government official participates in the operation of Farrell's fleet or in the conduct of its collective bargaining relations. No government official had a role in Farrell's decision to abide by the AFL-CIO Article XX ruling and recognize MMP as the exclusive bargaining agent.

On this record, the Second Circuit Court of Appeals held that, notwithstanding federal subsidization and regulation of the maritime industry, there was no "state action" because "factors in addition to government funding and regulation must be present" (App. 123a) (citation omitted). The Second Circuit's analysis is consistent with the other Courts of Appeals that have addressed the issue. *See Bethel v. Jendoco Construction Corp.*, 570 F.2d 1168, 1176-77 (3d Cir. 1978) (allegations of funding and regulation, "without a good deal more, . . . insufficient to bring the defendant companies' conduct within the purview of § 1983"); *Madry v. Sorel*, 558 F.2d 303 (5th Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (hospital's suspension of physician's staff privileges not "state action," notwithstanding public funding and regulation); *Briscoe v. Bock*, 540 F.2d 392, 395-96 (8th Cir. 1976) (hospital's dismissal of physician not "state action," notwithstanding public funding and regulation); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 314 (9th Cir. 1974) (public funding and regulation of hospital "do not provide a basis for a § 1983 suit"); *Jackson v. Norton-Children's Hospitals, Inc.*, 487 F.2d 502, 502-03 (6th Cir. 1973),

cert. denied, 416 U.S. 1000 (1974) (hospital's dismissal of physician "did not constitute state action," notwithstanding public funding and regulation); *Doe v. Bellin Memorial Hospital*, 479 F.2d 756, 761 (7th Cir. 1973) (Stevens, J.) ("The facts that defendants have accepted financial support, as alleged, from both the federal and state governments, and that the hospital is subject to detailed regulation by the State, do not justify the conclusion that its conduct, which is unaffected by such support or such regulation, is governed by § 1983").

Petitioners raise no important issue of law that merits Supreme Court review. This Court has already fully delineated the considerations applicable in determining "state action." *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

The Court of Appeals did not, as petitioners contend, invite review with its comment that the "question is a close one" (App. 125a). It was merely expressing the view, often voiced by this Court, that each "state action" case turns on its own "peculiar facts," *Burton*, 365 U.S. at 726, and that the question "frequently admits of no easy answer." *Jackson*, 419 U.S. at 350 (citations omitted). Petitioners' disagreement with the Second Circuit's analysis of the facts is not a basis for issuing the writ. This Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

The decision of the Court of Appeals is correct under the holdings of this Court. *Jackson* explains that in determining "state action" "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." 419 U.S. at 351 (citation omitted). A "nexus" exists where the private entity performs a "state function," *id.* at 352-53, the State places its "imprimatur" on the challenged private activity, *id.* at 357, or

the private entity and the State are in a "symbiotic relationship." *Id.* at 357-58.

The Court of Appeals found that, although the maritime industry serves the public interest, Farrell does not perform a state function because operating a merchant marine "has never been a function exclusively reserved to government" (App. 116a). This finding accords with *Jackson*, which instructs that a private entity performs a state function only when it exercises powers "traditionally exclusively reserved to the State," 419 U.S. at 352, and not when it merely engages in a business affected with the public interest. *Id.* at 352-53.

The Court of Appeals also held that although the United States government regulates the maritime industry, it did not place its "imprimatur" on Farrell's recognition of MMP because no federal official directly authorized or ordered Farrell to take that step (App. 124a-125a). *Jackson* likewise holds that, absent direct government involvement in the challenged private activity, even pervasive regulation "does not transmute a practice initiated by the [private entity] . . . into 'state action.' " 419 U.S. at 357. *See also Moose Lodge*, 407 U.S. at 176-77 (detailed regulation of private club insufficient to establish "state action" because regulation did not "in any way foster or encourage" challenged conduct).

The Court of Appeals did not find a "symbiotic relationship" between Farrell and the United States government because the Merchant Marine Act preserves Farrell's private character (App. 120a-124a). Farrell owns its ships. No government official participates in the operation of Farrell's fleet. The government does not derive any economic benefit from Farrell's operations. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), in contrast, involved complete physical, financial and economic interdependence between the government agency and the private business. *See Jackson*, 419 U.S. at 357-58; *Moose Lodge*, 407 U.S. at 174-75 (each distinguishing the special circumstances of *Burton*).

The Court of Appeals did not err in not finding "state action" based on the aggregate circumstances. This Court rejected the same argument in *Jackson*, holding that facts insufficient to show "state action" under any of the individual tests cannot in the aggregate "connect the State . . . with respondent's action so as to make the latter's conduct attributable to the State. . . ." 419 U.S. at 358.

II.

THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS THAT THERE WAS NO INFRINGEMENT OF PETITIONERS' FIRST AMENDMENT RIGHT OF ASSOCIATION DOES NOT RAISE AN IMPORTANT ISSUE AND IS CORRECT UNDER THE HOLDINGS OF THIS COURT.

Petitioners also seek review of the Second Circuit's holding that Farrell did not violate their right of association. The Court's finding of no "state action" obviates the need even to consider the First Amendment argument, because without "state action" Farrell is not subject to constitutional restrictions. In any event, the decision of the Court of Appeals raises no important First Amendment question and is correct under the holdings of this Court.

Petitioners do not show an infringement of their associational rights. They do not claim that membership in MMP would interfere with their political or ideological beliefs (App. 130a). Nor do they contend that they have a constitutional right to be represented by their former union, for they acknowledge that "the First Amendment [does not compel] Farrell to bargain with a union of supervisors . . ." (Pet., p. 28). Their claim is only that the First Amendment prohibits Farrell from enforcing the union shop provisions of the MMP contract without a prior determination that MMP is the majority union (Pet., p. 28).

This claim does not raise an issue for review. In *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961), a majority of this Court (the plurality and Justices Harlan and Frankfurter, concurring) agreed that compulsory membership in an association that required only payment of annual dues and did not interfere with an individual member's beliefs, was not an "impingement upon protected rights of association." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 313 (1979), held that a state-instituted procedure for selecting an exclusive bargaining agent that interfered with majority rule "presents as a general matter no First Amendment problems" (footnote omitted).

Even assuming that compulsory membership in MMP would raise a First Amendment issue, the Court of Appeals correctly found that such a limited intrusion was "outweighed by the countervailing government interests" (App. 137a). Petitioners are "supervisors" under the National Labor Relations Act. 29 U.S.C. § 152(11). Congress has excluded "supervisors" from the operation of the Act, including the provisions concerning self-determination. *Hanna Mining Co. v. District 2, M.E.B.A.*, 382 U.S. 181, 188 (1965). This exclusion frees an employer from any obligation to recognize the union preferences of its supervisory personnel. *Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653 (1974); *Hanna Mining Co. v. District 2, M.E.B.A.*, *supra*.

The Court of Appeals held that the petitioners could not use the First Amendment to circumvent this express congressional policy (App. 126a-131a). This holding comports with *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464 (1979), which instructs that "the First Amendment is not a substitute for the national labor relations laws." The Second Circuit's decision is also consistent with *Hanover Township Federation of Teachers Local 1954 v. Hanover Community School Corp.*, 457 F.2d 456, 461 (7th Cir. 1972), cited approvingly in *Smith*, where then Circuit Judge Stevens held that even when a government employer acts "to undermine the

economic strength of the union," the economic activities of the union members "are not protected by the First Amendment." [4]

The Court of Appeals also considered the disruptive effect on Farrell's operations if it were compelled to maintain rival groups of supervisory personnel on its ships (App. 135a-137a). A public employer, like a private employer, may enforce a union shop provision to avoid "facing conflicting demands from different unions, and . . . to reach agreements and settlements that are not subject to attack from rival labor organizations." *Abood v. Detroit Board of Education*, 431 U.S. 209, 221 (1977). This consideration is particularly important for ship's deck officers, because as supervisory personnel they are "obliged to be loyal to their employer's interests . . . ." *Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653, 660 (1974).

The Court of Appeals also held that the national policy favoring arbitration of labor disputes supported Farrell's decision to enforce the MMP contract (134a-135a). Farrell recognized MMP as exclusive bargaining agent in accordance with the AFL-CIO Article XX ruling, which was binding on both MMP and BMO by virtue of their AFL-CIO affiliations. The Court of Appeals properly accorded the arbitration award especial significance because deck officers are "supervisors" and "[n]o other administrative forum was readily available to resolve this dispute that had importance not only to the

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4 Citing *Hanover*, petitioners assert that "[i]f the Constitution proscribes the discharge of a public employee because of his membership in a union, it must certainly protect an employee discharged for his refusal to join a union" (Pet., p. 22) (footnote omitted). The portion of *Hanover* quoted by petitioners (Pet., p. 21) dealt with discharges in retaliation for union activities. There is no such claim in this case. "Petitioners were discharged by Farrell solely for their refusal to join MMP" (Pet., p. 20), not because they preferred another union. Contrary to the conclusion drawn by petitioners, a public employer may, consistent with the First Amendment, enforce a union shop provision and require union membership as a condition of employment. *Abood v. Detroit Board of Education*, 431 U.S. 209, 217-23 (1977).

interested parties but to others similarly situated throughout the nation" (App. 134a).

Finally, the Court of Appeals found Farrell's recognition of MMP analogous to the policy applied by the NLRB to maritime employees covered by the National Labor Relations Act (App. 133a-134a). Under its so-called "accretion doctrine" the NLRB holds that in a shipping industry acquisition like Farrell's acquisition of AEL, the purchasing company's union has the right to man the newly acquired ships. *Moore-McCormack Lines, Inc.*, 139 N.L.R.B. 796, 798-99 (1962); *Quarterly Report of N.L.R.B. General Counsel*, 100 L.R.R. 259, 266 (April 2, 1979). The NLRB applies this rule because ship transfers are common in the industry and the "accretion doctrine" avoids constant disruption. *Moore-McCormack Lines, Inc., supra*; *N.L.R.B. v. National Maritime Union*, 486 F.2d 907, 913 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974). In giving weight to NLRB policy, the Second Circuit followed this Court's admonition that "the Board is entitled to the greatest deference in recognition of its special competence in dealing with labor problems." *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, 316 (1965).

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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